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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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SNOHOMISH COUNTY PUBLIC TRANSPORTATION BENEFIT  
AREA CORPORATION dba COMMUNITY TRANSIT, *Petitioner*,

v.

FIRSTGROUP AMERICA, INC. dba FIRST TRANSIT, foreign  
corporation, *Respondent*.

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SUPPLEMENTAL BRIEF OF PETITIONER

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## I. INTRODUCTION

Washington law permits contractual indemnity for an indemnitee's own negligence. As part of a contract for commuter bus service, First Transit agreed to indemnify Community Transit "except only for those losses resulting solely from the negligence of Community Transit." Community Transit incurred \$1.25 million to defend and settle a loss. The parties stipulated that Community Transit was not solely negligent. Yet the Court of Appeals held that there was no indemnity obligation and refused to enforce the agreement as written.

The decision of the Court of Appeals conflicts with Northwest Airlines v. Hughes Air Corp., 104 Wn.2d 152, 702 P.2d 1192 (1985), and should be reversed. As in Hughes, this agreement clearly spells out that the indemnitor will indemnify for the indemnitee's negligence. The "only" exception is Community Transit's "sole negligence." "Sole" negligence means just that. It means Community Transit is 100% at fault and no one else. Here, the loss resulted from the shared negligence of Community Transit and a third party. As a matter of fact and law, if negligence was shared then Community Transit was not solely negligent.

To hold otherwise frustrates the parties' clear intention and undermines the freedom of businesses to allocate the risk of loss.

## **II. ASSIGNMENTS OF ERROR**

1. Relying primarily on Jones v. Strom Construction Co., 84 Wn.2d 518, 527 P.2d 1115 (1974), the Court of Appeals erred in determining that First Transit was not liable under the indemnity agreement because it was fault free. Further, the court erroneously applied *Jones* to one clause of the indemnity agreement without considering the entire provision.

2. The Court of Appeals erred by holding that the indemnity agreement, limited only by Community Transit's sole negligence, failed to provide clear notice that First Transit would be required to indemnify even if it was fault free. This holding cannot be reconciled with Hughes.

3. The Court of Appeals erred in holding that the "sole negligence" provision is not clear when a loss results from the shared negligence of Community Transit and a third party. Shared negligence and sole negligence are mutually exclusive.

### III. STATEMENT OF THE CASE

The facts are not disputed. Community Transit relies upon the Statement of Facts in its brief on appeal and the Statement of the Case in its Petition for Review. The key facts for this appeal are set forth below.

First Transit contracted with Community Transit to provide commuter bus service between Snohomish County and parts of King County including Seattle and Redmond. This means that First Transit operates buses during rush hour commutes on Interstate 5 and Interstate 405. The contract further requires First Transit to operate buses painted with Community Transit's logo and paint scheme. (CP 15)

First Transit agreed to indemnify Community Transit.

#### **3.54 HOLD HARMLESS AND INDEMNIFICATION**

The Contractor shall defend, indemnify and save harmless Community Transit, its officers, employees and agents from any and every claim and risk, including, but not limited to, suits or proceedings for bodily injuries (including death and emotional claims), patent, trademark, copyright or franchise infringement, and all losses, damages, demands, suits, judgments and attorney fees, and other expenses of any kind, on account of all personal bodily injuries (including death and emotional claims), property damages of any kind, whether tangible or intangible, including loss of use resulting therefrom, in connection with the work performed under this contract, or caused or occasioned in whole or in part by reason of the presence of the Contractor or its subcontractors, or their property, employees or agents, upon or in proximity to the property of Community Transit, or any other property

upon which the Contractor is performing any work called for or in connection with this contract, except only for those losses resulting solely from the negligence of Community Transit, its officers, employees and agents.

(CP 152)(Emphasis supplied).

Other contract provisions further evidence the parties' intent to shift the risk of loss to First Transit. First Transit agreed to obtain comprehensive general liability insurance and auto liability insurance, each with limits of \$20,000,000 per occurrence. (CP 153-54) In the event the contract was determined to be subject to RCW 4.24.115, First Transit waived its "immunity under industrial insurance, Title 51 RCW." (CP 152)

On February 24, 2004, a First Transit bus and a Community Transit bus were involved in a five-vehicle accident. The parties stipulated as follows with respect to negligence:

1. First Transit and driver Frank Whittington were fault free.
2. The accident was caused by the shared negligence of Community Transit and a third party.
3. "The accident did not result from the sole negligence of Community Transit." (CP 16)

Community Transit paid \$1,250,950.19 to defend, adjust and settle 42 injury claims from passengers of both buses as well as Mr. Whittington,

the First Transit driver. (CP 16-17) Community Transit tendered these claims to First Transit. First Transit rejected the tender even though it conceded that Community Transit was not solely negligent. (CP 196)

The parties filed cross-motions for summary judgment. The trial court granted summary judgment dismissal to First Transit. Community Transit appealed and the Court of Appeals affirmed in an unpublished opinion. Pursuant to RAP 13.4(b)(1), Community Transit petitioned for review because the decision below conflicts with Northwest Airlines v. Hughes Air Corp. This Court accepted review.

#### IV. ARGUMENT

At issue is whether Northwest Airlines v. Hughes is still the law of Washington. The Court of Appeals' opinion marginalized Hughes. Instead the court relied upon factually distinguishable, older cases involving indemnity agreements that did not explicitly state that the indemnitor must indemnify for the indemnitee's own negligence. *See, e.g., Jones v. Strom Construction Co.*, 84 Wn.2d 518, 527 P.2d 1115 (1974).

The court compounded its error by applying these inapposite cases to separate clauses of the indemnity agreement without considering the agreement as a whole. Even still, the court did not persuasively explain

how First Transit's indemnity agreement is any less clear than the agreement in Hughes. Nor did the court convincingly explain how strict construction renders the term "sole negligence" ambiguous. Other courts have enforced indemnity agreements limited only by the indemnitee's "sole negligence", where a third party was partly at fault. Hughes controls this case and mandates that First Transit indemnify Community Transit.

**A. HUGHES NOT JONES CONTROLS THIS CASE**

In Hughes, a unanimous Court traced the evolution of Washington indemnity law and reconciled decades of prior cases. 104 Wn.2d at 154-58. "Washington currently requires, as do some other states, that more specific language be used to evidence a clear and unequivocal intention to indemnify the indemnitee's own negligence. (citing, *inter alia*, Dirk v. Amerco Marketing Co., 88 Wn.2d 607, 612-13, 565 P.2d 90 (1977); and Scruggs v. Jefferson Cy., 18 Wn. App. 240, 244, 567 P.2d 257 (1977)).

**1. Hughes Enforced Clearly Worded Indemnity**

Hughes enforced an indemnity agreement in a commercial lease. Hughes had agreed to "indemnify the Lessor [Northwest] from and against any and all claims . . . arising out of or in connection with the use and occupancy of the premises by Lessee, its agents, servants, employees or invitees whether or not caused by Lessor's negligence." 104 Wn.2d at

153 (some emphasis in original). Hughes' employee was injured as a result of Northwest's sole negligence. Neither Hughes nor its employee was at fault. The Court enforced indemnity because the intention to indemnify for the indemnitee's own negligence was "clear and unequivocal." Id. at 155. "The clause involved in this case explicitly refers to injuries 'whether or not caused by Lessor's [Northwest's] negligence' . . . Even under the more stringent requirement, the involved indemnification clause clearly includes coverage for the indemnitee's negligence" Id. at 156.

## **2. Jones Limited to Its Facts**

Like the Court of Appeals in this case, the lessee in Hughes relied heavily upon Jones. Hughes, 104 Wn.2d at 156. The lessee asserted that Jones "stand[s] for the proposition that, as a matter of law, an indemnity agreement cannot be construed to require an indemnitor to hold harmless the indemnitee for losses resulting solely from the indemnitee's own negligence." Hughes, 104 Wn.2d at 156. This Court disagreed. "Petitioner misreads these cases." Id.

This Court focused on the precise language of the indemnity agreement in Jones where a subcontractor agreed to indemnify the contractor from any claims " 'arising out of,' 'in connection with,' or

'incident to' *[the subcontractor's] 'performance' of the subcontract.*"

This Court noted that "[t]he clause referred only to the subcontractor's performance; it made no mention of or reference to the contractor's performance. Construing the language strictly, we held that the involved indemnification clause required an act or omission by the subcontractor in performance of the subcontract for it to be applicable." Id. at 156-57 (Emphasis supplied).

In Hughes, this Court rejected the lessee's broad reading of Jones and clarified that it only applied to the indemnity language in that case.

**Petitioner erroneously asserts that this language requires employer negligence before *any* indemnification clause will be enforced.** Reading this language in context, the "such indemnification agreements" referred to in this passage are agreements which require, by their language, the subcontractor's performance be involved before the clause is applicable. Jones held only that the language of the indemnity clause involved in *that case* could not be construed to require indemnification where the acts of the indemnitee were the sole cause of the injury.

Id. at 157 (Emphasis supplied). This court concluded that the true rule of Jones is that "for an indemnitor to be found responsible for an indemnitee's own negligence, the agreement must be clearly spelled out. The Northwest-Hughes lease clearly spells out an agreement for indemnity even when Northwest is negligent." Id. at 158. Jones does not apply to

indemnity agreements that explicitly state that indemnitor must indemnify for the indemnitee's own negligence.

**3. Hughes Correctly States Washington Indemnity Law**

Hughes correctly summarizes the law of indemnity in Washington. An agreement to indemnify for an indemnitee's sole negligence is valid if the indemnity obligation is clearly spelled out. 104 Wn.2d at 158. Further, if the agreement explicitly states that the indemnitor will be liable for the indemnitee's negligence, it applies even if the indemnitor is fault free. Id. If on the other hand, the agreement does not clearly spell out that the indemnitor will be liable for the indemnitee's own negligence, then there must be some over act or omission by the indemnitor for indemnity to apply. Id. at 157 (*citing Jones*, 84 Wn.2d 518).

**4. Test: Does Indemnity Agreement Explicitly Reference Indemnitee's Negligence?**

As explained in Community Transit's Petition for Review, all of the Washington cases cited by the Court of Appeals can be reconciled by asking the following question: Does the indemnity agreement explicitly provide that the indemnitor must indemnify for the indemnitee's own negligence? Where the answer is "yes" the courts hold that the indemnity

obligation applies.<sup>1</sup> In those cases, indemnity applied even though the indemnitor was fault free.<sup>2</sup> Where the answer is "no" courts do not require indemnity.<sup>3</sup> (Petition at 10-14).

**B. COURT OF APPEALS ERRED IN APPLYING LAW TO THIS INDEMNITY AGREEMENT**

The Court of Appeals misapplied the law to this indemnity agreement. First Transit succinctly summarized the court's erroneous approach:

Indemnification requires that a claim be (1) in connection with the work performed under the contract, *or* (2) caused or occasioned in whole or in part by reason of the presence of First Transit or its subcontractors, or their property or agents, *but not* a (3) loss resulting solely from the negligence of Community Transit . . . In other words, (3) is an exception to (1) and (2). **If the claim does not fall within (1) or (2), (3) is irrelevant.**

Based on the authority of Jones and its progeny, the panel found that the claim did not fall within (1) or (2), but even if it did, the language of (3) was not clear and unequivocal.

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<sup>1</sup> Hughes, 104 Wn.2d 152; Northern Pac. Ry. Co. v. National Cylinder Gas Div., 2 Wn. App. 338, 339-40 n.1, 467 P.2d 884 (1970); *see also* McDowell v. Austin Co., 105 Wn.2d 48, 710 P.2d 192 (1985).

<sup>2</sup> Northwest Airlines v. Hughes Air Corp., 37 Wn. App. 344, 347 and n.1, 679 P.2d 968 (1984) *aff'd* 104 Wn.2d 152, 702 P.2d 1192 (1985); N. Pac., 2 Wn. App. at 344.

<sup>3</sup> Jones, 84 Wn.2d 518; Brame v. St. Regis Paper Co., 97 Wn.2d 748, 649 P.2d 836 (1982) Northern Pac. Ry. Co. v. Sunnyside Valley Irrigation Dist., 85 Wn.2d 920, 540 P.2d 1387(1975); Dirk v. Amerco Mktg. Co., 88 Wn.2d 607, 565 P.2d 90 (1977); and Scruggs v. Jefferson Cy., 18 Wn. App. 240, 567 P.2d 257 (Div. II 1977).

(Answer to Petition at 13-14, citing Slip op. at 9-11) (Emphasis in original). The court's approach misreads the indemnity agreement, is contrary to Hughes and leads to an erroneous result.

**1. Jones and Scruggs Do Not Apply to Clauses in Isolation**

The Court of Appeals separately analyzed the "in connection with" clause. (Slip op. at 8-9). Applying Jones, the court concluded that the "in connection with" clause "alone is not sufficient to trigger First Transit's duty to indemnify Community Transit." (Slip op. at 9) This is not disputed. Yet that language is only part of the indemnity agreement.

In Hughes, this Court did not parse the indemnity agreement even though it contained similar triggering language to the agreement in Jones. Compare Jones, 84 Wn.2d at 521 (Claims "arising out of [or] in connection with the subcontractor's performance") with Hughes, 104 Wn.2d at 153 (Claims "arising out of or in connection with the use and occupancy of the premises by Lessee"). Nevertheless Hughes did not apply Jones to the "arising out of" clause without considering the entire indemnity agreement. Indeed, Hughes scarcely mentions this clause.

Rather, the Court focused on the additional indemnity language, which was not found in Jones: "whether or not caused by Lessor's

negligence.” Id. Obviously, this additional language distinguished the indemnity agreement in Hughes from that in Jones. This explains why this Court enforced indemnity in Hughes but not in Jones. Similarly, the language of the entire indemnity agreement, not simply the “in connection with” clause, gives First Transit fair notice that it must indemnify for Community Transit’s negligence.

The Court of Appeals similarly erred by analyzing the “caused or occasioned . . . by First Transit’s presence” language separate from the rest of the agreement. Relying upon Scruggs, the court held that there is no indemnity under this clause because First Transit “was inculpably performing its contractual obligations when the accident happened.” (Slip op. at 10) The same is true, however, of the injured employee in Hughes who was inculpably using the premises when he suffered injury. 104 Wn.2d at 153. The difference is that the agreement in Hughes, like the indemnity agreement here, explicitly mentioned that indemnity applied even when the indemnitee was negligent.

Curiously, the court did not rely upon the case that involved an indemnity agreement virtually identical to First Transit’s agreement. Northern Pac., 2 Wn. App. 338, 339-40n.1, 467 P.2d 884 (1970). The indemnitor in that case was fault free. Indemnity still applied. As in

Hughes, the indemnity obligation was clearly spelled out so that the indemnitor was liable even though it was not negligent.

**2. Sole Negligence Provision Defines the Scope of the Indemnity Agreement and Satisfies Hughes**

Consistent with its approach to the rest of the indemnity agreement, the Court of Appeals erroneously considered the sole negligence clause in isolation. (Slip op. at 10-11) “But nothing in this indemnity provision clearly spells out that First Transit would indemnify Community Transit even when First Transit was fault free.” (Slip. op. at 10) The court attempted to distinguish Hughes. The language in Hughes gave “fair notice” that indemnity would apply even if the landlord was solely negligent and the tenant was blameless. “In contrast, the “sole negligence” clause here expressly rejects indemnification for claims caused solely by the indemnitee’s negligence.” (Slip op. at 11n.3).

The court’s analysis of the “sole negligence” provision misreads the indemnity agreement, misstates Hughes, and undermines the freedom to contractually indemnify for anything less than the indemnitee’s sole negligence. First, the “sole negligence” provision is not a stand-alone clause. It is not a mere exception to the triggering clauses. The “sole negligence” language also defines the scope of the indemnity agreement. It is true that it “expressly rejects” indemnity for Community Transit’s sole

negligence, but that is the bargain that the parties made. Parties are free to contract for a lesser indemnity obligation than approved in Hughes.

Second, as in Hughes, this indemnity agreement clearly spells out that First Transit must indemnify for Community Transit's negligence. First Transit agreed to defend and indemnify Community Transit for all losses "except only for those losses resulting solely from the negligence of Community Transit." Taken as a whole, this indemnity agreement is similar to the indemnity agreement in Hughes in three critical respects. Both indemnity agreements: (1) identify the indemnitee by name; (2) use the word "negligence" in reference to the indemnitee only; and (3) clearly spell out the extent of the indemnitee's negligence to be indemnified: sole negligence (Hughes), everything but sole negligence (Community Transit). First Transit had fair notice that it would be liable for Community Transit's negligence. This is all that Washington law requires.

Moreover, the court below misstates Hughes when it claims that a valid indemnity provision must clearly spell out that the *indemnitor* would indemnify even when the *indemnitor* was fault free. (Slip op. at 10, 11n.3). This is not what Hughes holds. Rather, Hughes focused on whether the obligation to indemnify for the *indemnitee's* negligence was

clearly spelled out. 104 Wn.2d at 158. Hughes did not discuss whether or not the *indemnitor* (tenant) was fault free.

By switching the focus of the indemnity agreement from the indemnitee's negligence to the indemnitor's blamelessness, the court invokes the rule of Jones not Hughes. That is appropriate if the indemnity agreement makes no mention of the indemnitee's negligence. It is not appropriate here where the entire agreement clearly spells out that First Transit will indemnify even when Community Transit is negligent, but not solely negligent.

**3. Indemnity Agreement Applies to Shared Negligence of Community Transit and Third Party**

The Court of Appeals erroneously claims that this indemnity agreement does not clearly and unequivocally apply to the shared negligence of Community Transit and a third party. (Slip. op. at 1, 11) The court argues that it must strictly construe the indemnity agreement to ensure First Transit has "fair notice" that it may be liable for Community Transit's negligence. (Slip op. at 11) Yet strict construction means only to resolve any doubts in favor of the indemnitor. "Such clauses are to be viewed realistically, recognizing the intent of the parties to apportion the risk of loss or damages arising from performance of the contract." Scruggs, 18 Wn. App 243-44.

Here, the meaning of the terms “sole” or “solely negligent” is not in doubt.<sup>4</sup> As a matter of law, only one entity can be “solely” negligent. For this exception to apply, Community Transit must be 100 percent at fault and no one else. There is no other meaning. Shared negligence is completely different. It means that more than one person is at fault. Shared negligence and sole negligence are mutually exclusive. Strict construction does not require a court to find ambiguity where none exists. Indeed, First Transit stipulated that Community Transit was not solely negligent. (CP 16)

Moreover, a realistic view of the entire contract shows the parties intended to shift significant risk of loss to First Transit. Under the contract, First Transit operated buses bearing Community Transit’s paint scheme and logo. These buses and the First Transit drivers and passengers were surrounded by thousands of moving vehicles during rush hour commutes on the freeway. (CP 15) The contract required First Transit to

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<sup>4</sup> The terms “solely” or “sole negligence” are not ambiguous. Words used in a contract should be given their “ordinary, usual, and popular meaning . . .” Hearst Commc’ns, Inc. v. Seattle Times Co., 154 Wn.2d 493, 504, 115 P.3d 262 (2005). “Ordinary meaning” is considered to be the dictionary definition of the word. Nationwide Ins. Co v. Hayles, Inc., 136 Wn. App. 531, 537, 150 P.3d 589 (2007). As an adjective (or an adverb), “sole” is defined as “1. Being the only one; single; [or] 2. Of or pertaining to one individual or group; exclusive.” American Heritage Dictionary at 1163 (2<sup>d</sup> College Edition 1985) (Appendix B to Petition).

obtain comprehensive general liability insurance and auto liability insurance, each with limits of \$20,000,000 per occurrence. (CP 153-54) First Transit had fair notice that it might be liable for “a large and potentially ruinous award assessed against it based solely on the negligence attributable to [Community Transit].” (Slip op. at 4) (*citing McDowell v. Austin Co.*, 105 Wn.2d 48, 53, 710 P.2d 192 (1985)).

#### 4. Third Circuit Enforced Similar Indemnity Agreement

The United States Court of Appeals for the Third Circuit enforced a similar indemnity agreement for losses caused by the shared negligence of an indemnitee and third party. Beloit Power Sys., Inc. v. Hess Oil Virgin Islands Corp., 757 F.2d 1431 (3d Cir. 1985). In Beloit, the buyer of an electrical control panel (Hess) hired a subcontractor (Litwin) to install the panel. A Litwin employee (Murray) was injured while installing the panel and sued the product manufacturer (Beloit). Beloit then sued Hess for indemnity. Hess in turn sued Litwin based on an indemnity agreement.

From date of Contract until Ready for Charge date, **[Litwin] shall indemnify and hold [Hess] harmless from and against any and all loss, damage, injury liability and claims thereof, including claims for personal injuries, death and property damage and loss, unless caused by the sole negligence of [Hess].**

Id. at 1432-33 (Emphasis supplied). The Third Circuit affirmed summary judgment for Hess (indemnitee) on its indemnity claim against Litwin

(indemnitor). *Id.* at 1433. The court found no ambiguity in the indemnity agreement's "sole negligence" provision.

**Litwin argues that in construing its agreement to indemnify Hess for all liabilities "unless caused by the sole negligence of [Hess]", we should look only to Hess' negligence vis-a-vis Litwin. However, the language of the agreement does not lend itself to such an interpretation. If unambiguously excuses Litwin from the indemnity obligation only if Hess is the sole negligent party. Therefore, if a third party also bears some of the responsibility for the injury, the "sole negligence" provision is inapplicable. Since the jury in the *Murray* action found Beloit liable on both the count claiming negligence and the count claiming strict liability, the loss was, at least in part, the responsibility of a party other than Hess. The district court correctly concluded that under these circumstances, the indemnity agreement was applicable, since liability or loss was not caused "by the sole negligence of [Hess]."**

*Id.* at 1433 (Emphasis supplied).

Similarly, the language of § 3.54 unambiguously excuses First Transit from indemnity only if Community Transit is the sole negligent party. First Transit concedes that the driver of the Honda Accord also bears some responsibility for the 42 injury claims. (CP 16). Therefore, First Transit must indemnify because the loss did not result solely from Community Transit's negligence.

## V. CONCLUSION

The decision of Court of Appeals conflicts with Northwest Airlines v. Hughes and should be reversed. Hughes provides a sensible rule that

indemnifying for an indemnitee's negligence is permitted if the obligation is clearly spelled out. This Court should clarify Washington indemnity law by reaffirming its holding in Hughes and limiting Jones v. Strom Construction to the type of indemnity agreement in that case.

Applying Hughes to this case, the parties' contract clearly spells out that First Transit will indemnify "except only" for losses "resulting solely from the negligence of Community Transit." Even though a third party was partly at fault and First Transit was fault free, Community Transit was not solely negligent. Sophisticated parties should have the freedom to allocate the risk of loss among themselves and have the indemnification agreement enforced as written. This Court should reverse the Court of Appeals and remand for entry of judgment in favor of Community Transit.

DATED THIS 1<sup>st</sup> day of June, 2010.

Respectfully submitted,

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